No. 89-1332 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DAVID V. BERNAL
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The Immigration Reform and Control Act of 1986 provides that there shall be no judicial review of a "determination respecting an application" for Special Agricultural Worker (SAW) status except in the review of a deportation or exclusion order (8 U.S.C. 1160(e)). The question presented is whether this provision precludes a federal district court from exercising jurisdiction over an action alleging a pattern and practice of procedural due process violations by the Immigration and Naturalization Service in its treatment of individual applications under the SAW program.

PARTIES TO THE PROCEEDING

Petitioners, defendants below,* are Gene McNary, Commissioner of Immigration and Naturalization; Richard B. Smith, District Director, Immigration and Naturalization Service, District Office Number 6; Thomas Fisher, District Director, Immigration and Naturalization Service, District Office Number 26; Lewis DeAngelis, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region; Immigration and Naturalization Service, Department of Justice; James A. Puleo, Acting Associate Commissioner for Examination, Immigration and Naturalization Service; Terrance M. O'Reilly, Assistant Commissioner for Legalization, Immigration and Naturalization Service; Dick Thornburgh, Attorney General of the United States; and the United States Department of Justice. The respondents, plaintiffs below, are Haitian Refugee Center, Inc., a not-for-profit corporation; Roman Catholic Diocese of Palm Beach; Marie Gizele Angrand; Germaine Cadet; Rosita Delva; Dieumercie Desir; Joseph Saintil Dieudonne; Gerard Henry; Marie France Jean-Philippe; Novamise Julien; Francklin Joseph; Sylvia Lindor; Recol Neus; Rose Pierrecina Lebon Pierre; Marie Philomene Servilien; Hector Trejo Tamayo; Juan Tamayo Vega; Marie Raquel Viera; and Jeanette Vixama.

* The individual petitioners, who are parties in their official capacities, have been substituted for their predecessors in office, Alan C. Nelson, Perry Rivkind, Kenneth Pasquarell, William Chambers, Richard Norton, William Slattery, and Edwin Meese III, respectively. See Sup. Ct. R. 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 872 F.2d 1555. The opinion and order of the district court (Pet. App. 18a-54a, 55a-57a) are reported at 694 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1989. A petition for rehearing was denied on October 10, 1989. Pet. App. 58a-59a. On January 3, 1990, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 17, 1990. The petition was filed on February 20, 1990 (a Tuesday following a Monday holiday), and granted on June 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of Sections 106, 210, and 279 of the Immigration and Nationality Act, 8 U.S.C. 1105a, 1160, and 1329, and 28 U.S.C. 1331 are set forth in an appendix (App., *infra*, 1a-4a).

STATEMENT

A. The Statutory Scheme

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, "represent[ed] the most comprehensive immigration reform effort in the United States in 20 years." S. Rep. No. 132, 99th Cong., 1st Sess. 18 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 51-55 (1986) (describing history of legislation). As an integral part of that effort, Congress established two major legalization programs that permitted certain undocumented aliens in the United States to obtain lawful resident status. The first legalization program applied to aliens who had resided continuously and unlawfully in the United States since January 1 1982. 8 U.S.C. 1255a. The second program applied to "Special Agricultural Workers" (SAW)—those aliens who had performed at least 90 days of qualifying agricultural work in the United States during the 12 months ending May 1, 1986. 8 U.S.C. 1160(a).

IRCA provided that applicants for SAW status had to submit their applications during an 18 month period beginning June 1, 1987. 8 U.S.C. 1160(a)(1)(A). If an applicant established (1) 90 days of qualifying agricultural work, and (2) his admissibility to the United States as an immigrant, the Attorney General was required to adjust the alien's status to that of temporary resident. 8 U.S.C. 1160(a)(1). In a second phase of the SAW program, such aliens would become eligible for adjustment of status to that of aliens lawfully admitted for permanent residence. 8 U.S.C. 1160(a)(2).

Congress conferred authority for administering the legalization programs on the Attorney General, who in turn has delegated that authority to the Commissioner of Immigration and Naturalization. 8 U.S.C. 1160, 1255a; 8 C.F.R. 2.1. Under regulations of the Immigration and Naturalization Service (INS), SAW applications were initially processed by specially created legalization offices. The legalization offices were required to interview each applicant personally, and in those interviews the applicant had to establish eligibility for SAW status. 8 C.F.R. 210.1(h), 210.2(c)(2)(iv) and (c)(4)(i). Thereafter, the applications were adjudicated by one of the four INS Regional Processing Facilities. 8 C.F.R. 210.1(p).[1] Whenever a SAW application was denied, INS regulations required that the alien be given written notice setting forth the reasons for the denial and the applicant's right to an administrative appeal. 8 C.F.R. 103.3(a)(2), 210.2(f).

IRCA expressly limits the scope of administrative and judicial review in the SAW program. Section 1160(e)(1) of IRCA provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1160(e)(1). The subsection then directs the Attorney General to establish an "appellate authority to provide for a single level of administrative appellate review," and provides that "[t]here shall be judicial review of such a denial [of SAW status] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(2)(A) and (e)(3)(A).[2] The

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[1] As amended, the regulations permitted INS district directors to approve SAW applications if a Regional Processing Facility had required a second interview and the alien established eligibility, or to deny SAW applications filed by applicants who were ineligible for approval. 8 C.F.R. 103.1(n)(2).

[2] Congress enacted a virtually identical provision for the general legalization program. 8 U.S.C. 1255a(f).

cited provision, 8 U.S.C. 1105a, provides for the exclusive review of an order of deportation in the courts of appeals, see *Foti* v. *INS*, 375 U.S. 217 (1963); *INS* v. *Chadha*, 462 U.S. 919, 938 (1983), and for the exclusive review of an order of exclusion in habeas corpus proceedings.

The legalization programs attracted "amnesty" applications on an unprecedented scale. According to information reported to Congress in May 1989, nearly 3.1 million applications were filed. Of the 1,843,744 applications adjudicated as of May 1989, 95.7% were approved. In the general legalization program, the approval rate was 96.6%, while in SAW, the approval rate was 92.9%.[3] INS anticipated that the overall approval rate for the SAW program would decline somewhat as it completed investigation of cases for fraud. *Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 400, 403 (1989) (statement of Alan C. Nelson, INS Commissioner).

B. The Present Controversy

1. Respondents are the Haitian Refugee Center (HRC); the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach, Florida (MRS); and 17 individual aliens whose SAW applications were denied. On June 13, 1988, respondents brought suit against petitioners in the United States District Court for the Southern District of Florida. Respondents alleged that INS had adopted unlawful policies and practices in making SAW determinations, and that these policies and practices were resulting in erroneous denials of SAW applications.[4] Respondents claimed that these policies and practices violated IRCA and the Due Process Clause. On behalf of themselves and a class consisting of SAW applicants in the Eleventh Circuit who had been or would be denied SAW status because of the alleged unlawful practices, respondents sought declaratory, injunctive, and mandatory relief against INS. Pet. App. 2a, 19a-20a.

Following a hearing, the district court granted respondents' motion for class certification and for a preliminary injunction. Pet. App. 55a-57a. Initially, the court held that it had subject matter jurisdiction over the action, notwithstanding IRCA's specific and limited provisions for judicial review. *Id.* at 36a-40a. The court reasoned that respondents' complaint fell under its general federal question jurisdiction because it did not challenge INS's determination in any particular case. "[R]ather," the court explained, the complaint "attacks the manner in which the entire program is being implemented." *Id.* at 38a, citing *Haitian Refugee Center (HRC)* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).

The court also held that the organizational plaintiffs (HRC and MRS) had standing to pursue their claims against the operation of the SAW program. Pet. App. 40a-44a. The court noted that HRC, whose main function is to provide legal representation to Haitian refugees, had alleged a direct injury to its ability to assist

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[3] 1,768,089 applications were filed under the general legalization program, while 1,301,804 were filed under SAW.

[4] In particular, respondents alleged that INS (1) had imposed an improper burden of proof on applicants by insisting upon corroborating evidence (in addition to affidavits submitted by applicants) to establish the requisite 90 days of agricultural employment; (2) had improperly denied "non-frivolous" applications at the legalization office level, thereby depriving applicants of work authorization pending review of their applications; (3) had issued notices of denial that inadequately described the grounds for denial and provided inaccurate information regarding appeals; and (4) had conducted improper interviews by (i) failing to provide interpreters for applicants, (ii) failing to disclose adverse evidence to applicants to permit rebuttal, and (iii) refusing to allow applicants to present witnesses in support of their claims. Pet. App. 19a-20a.

the Haitian refugee community, and an indirect injury to its membership. As to MRS, the court noted that under IRCA it was a "qualified designated entity," authorized to assist in the preparation and submission of applications for SAW status.[5] MRS alleged that INS's practices, by discouraging aliens from applying for SAW status, had prevented it from performing its mission. *Id.* at 41a.

Turning to respondents' claim for preliminary relief, the court concluded that respondents were likely to prevail on the merits and had satisfied the other requisites for a preliminary injunction. The court therefore entered a detailed preliminary injunction ordering INS, *inter alia*, to vacate the denials issued to certain SAW applicants and to remedy the violations that the court believed had affected the determinations in those cases. Pet. App. 55a-57a.[6] Other paragraphs of the injunction ordered INS to take the following steps with regard to the processing of SAW applications (*id.* at 57a):

> (6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and

[5] "Qualified designated entities" were created by IRCA in order to allow aliens to file applications with nongovernmental intermediaries who would forward the applications to the Attorney General. 8 U.S.C. 1160(b)(1)(A) and (b)(2), 1255a(c)(1) and (c)(2). Congress provided for such entities in order to encourage undocumented aliens to apply for legalization without fear of exposure to INS. H.R. Rep. No. 682, *supra*, Pt. 1, at 73. To that end, the files of such entities relating to the assistance of an alien with respect to an application are confidential, and INS lacks access to those files without the alien's consent. 8 U.S.C. 1160(b)(4), 1255a(c)(4).

[6] The injunction ordered INS to reopen denials involving: defective notices of denial; applications denied on the basis of adverse evidence that INS had considered without the applicants' knowledge; and applications determined under an incorrect burden of proof. Pet. App. 55a-56a. Petitioners did not challenge those paragraphs of the preliminary injunction on appeal (except to the extent that petitioners challenged the district court's jurisdiction). *Id.* at 2a-3a.

> Haitian Creole, and translators in other languages shall be made available if necessary;
>
> (7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, co-workers, and any other individuals who may offer testimony in support of the applicant;
>
> (8) The Interviewers shall be directed to particularize the evidence offered, testimony taken, credibility determinations, and any other relevant information on the form I-696.[7]

2. Petitioners sought review of paragraphs (6), (7), and (8) of the preliminary injunction in the court of appeals, and challenged the district court's jurisdiction to entertain this action. The court of appeals affirmed. Pet. App. 1a-17a. The court began by holding that 8 U.S.C. 1160(e) did not preclude the district court from exercising federal question jurisdiction. Stating that it had "previously considered and rejected this argument," the court explained that *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*, established the propriety of district court jurisdiction to review "allegations of systematic abuses by INS officials." Pet. App. 9a-10. Applying the principles announced in those cases, the court said (*id.* at 11a):

> In this action, appellees do not challenge the merits of any individual status determination; rather, like the plaintiffs in *Haitian Refugee Center* v. *Smith* and *Jean* v. *Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.

[7] The court subsequently granted respondents' motion to compel INS to produce up to 20,000 "legalization files" pertaining to the class members, notwithstanding the confidentiality provisions in IRCA protecting against disclosure of such files, see 8 U.S.C. 1160(b)(6). The government's petition for mandamus challenging that order was denied by the court of appeals. *In re Nelson*, 873 F.2d 1396 (11th Cir. 1989) (per curiam).

In addition, the court found that the plaintiffs were not obligated to exhaust any administrative remedies, and rejected petitioners' argument that the organizational plaintiffs lacked standing. Pet. App. 11a-12a.

After disposing of the jurisdictional issues, the court of appeals held that the issuance of the preliminary injunction did not constitute an abuse of discretion. The court stated that the right of SAW applicants to apply for temporary residency, and to substantiate their claims to eligibility, must be accorded the protection of due process. Applying the three-factor test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court upheld the provisions of the injunction requiring INS to provide adequate translators at SAW interviews, to permit applicants to call witnesses at such interviews, and to particularize evidence offered, testimony taken, and evidentiary determinations on its forms for such interviews. Pet. App. 13a-17a.

SUMMARY OF ARGUMENT

The sole question presented is whether the judicial review provisions of IRCA—which permit review of a "determination respecting" a SAW application only in two designated types of proceedings—bar a federal district court, in a completely different proceeding, from exercising general jurisdiction over the individual and organizational claims in this case. We submit that the answer is yes. That conclusion flows from the language and design of the statute; it also accords with the holding of the D.C. Circuit based on a detailed analysis of counterpart provisions in the general legalization program. *Ayuda, Inc.* v. *Thornburgh*, 889 F.2d 1325, 1329-1340 (1989), petition for cert. pending, No. 89-1018. The Eleventh Circuit's holding to the contrary, empowering district courts to review broadscale procedural claims under the SAW program, should be reversed.

A. IRCA precludes "judicial review of a determination respecting an application" for SAW status except in the

context of a proceeding to review an order of deportation or exclusion. Deportation orders, in turn, are reviewable exclusively in the courts of appeals; exclusion orders are reviewable exclusively in habeas corpus proceedings. These provisions plainly cut off other sources of district court jurisdiction with respect to all claims within their coverage. When Congress establishes a particular review mechanism, courts are not free to fashion alternatives to the specified scheme. Thus, IRCA prevents district courts from asserting federal question jurisdiction under 28 U.S.C. 1331, or general immigration jurisdiction under 8 U.S.C. 1329, to review "determination[s] respecting" SAW applications.

The legislative history confirms the natural reading of IRCA's text. Congress perceived that the massive scale of the legalization programs required significant limitations on judicial review. Consequently, the legislation ultimately enacted was intended to authorize only a limited form of review of individual cases in the deportation or exclusion context—not the sort of sweeping class action brought here.

B. Respondents' complaint challenges determinations within the scope of IRCA's review provisions, and therefore cannot be brought in this action. The individual respondents challenged a variety of INS procedures used to adjudicate their SAW applications. These claims could have been raised before INS's Administrative Appeals Unit, and subsequently presented to a court after entry of an exclusion or deportation order. See *INS* v. *Chadha*, 462 U.S. 919, 938 (1983). Consequently, they are properly characterized as seeking review of a "determination respecting an application" for SAW status under 8 U.S.C. 1160(e)(1).

IRCA's review provisions cannot be evaded by respondents' claim that the individual applicants are challenging only "practices," "policies," or "procedures," and not the ultimate denials of their applications. The practices in question cannot be divorced from their impact on individ-

ual applications. Cf. *Heckler* v. *Ringer*, 466 U.S. 602 (1984). Indeed, if the complaint were construed as challenging INS's practices in such an abstract and isolated fashion, the complaint would not even have identified agency action amenable to judicial review under general principles of reviewability. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3172 (1990).

But a fair reading of the complaint reveals that respondents have sought review of INS's practices as they affect individual application denials, and there can be no doubt that this action is barred by the express terms of Section 1160(e)(1). It is no answer to this bar that respondents have not asked the district court actually to grant anyone SAW status. The phrase "determination respecting an application" encompasses both procedures and final decisions. Cf. *Heckler* v. *Ringer*, *supra*. And the preclusion of district court review does not raise constitutional issues of the sort noted in *Webster* v. *Doe*, 486 U.S. 592, 603 (1988), because the individual applicants have an opportunity for judicial review after entry of a final order of deportation or exclusion.

Nor does IRCA permit the organizational respondents to sue in district court. "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Institute*, 476 U.S. 340, 349 (1984). That is the case here with respect to the organizational plaintiffs. Permitting such groups to sue would undermine the plan for administrative and judicial review wrought by Congress, and such suits are not required to ensure the protection of any statutory interest.

C. The Eleventh Circuit failed to analyze either the structure of IRCA or its specific language, instead relying on lower court precedents under the general immigration laws that have upheld a "pattern and practice" exception to 8 U.S.C. 1105a. In our view, those cases are

wrongly decided, but in any event do not support a similar result under IRCA's quite different language. IRCA does not simply incorporate the judicial review apparatus applicable to deportation or exclusion cases, it goes farther by adding an explicit prohibition on any other form of judicial review.

The experience of district courts in applying the "pattern and practice" theory under IRCA provides additional support for the view that Congress did not intend to sanction it. That theory has an inevitable tendency to launch the judiciary not only into wholesale challenges to agency programs, but also into an unaccustomed, and unwarranted, role of administering a program entrusted to the hands of the Attorney General. Given the primary responsibility of the political branches in formulating and executing immigration policy, and the correspondingly limited role for the judiciary, courts should be particularly hestitant to depart from the case-by-case method of review that Congress provided under IRCA.

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION OVER THE COMPLAINT

A. IRCA Precludes The Exercise Of General District Court Jurisdiction Over Any "Determination Respecting An Application For Adjustment Of Status"

1. In framing IRCA, Congress carefully structured the SAW program to channel all judicial review of INS determinations to the courts of appeals in the review of a deportation order (or district courts in exclusion proceedings), thereby cutting off general sources of jurisdiction in federal district courts.

The Act declares in all-encompassing terms: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this

subsection." 8 U.S.C. 1160(e)(1). In the following paragraphs, the subsection spells out the precise procedures intended to provide the exclusive method of review. The subsection requires the establishment of "a single level of administrative appellate review of such a determination," and unequivocally states that "[t]here shall be judicial review of such a denial [of a SAW application] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(2)(A) and (e)(3)(A). Section 1105a(a), in turn, provides that a petition for review in the court of appeals "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation," while exclusion orders are reviewable exclusively in habeas corpus proceedings.[8] 8 U.S.C. 1105a(b). Congress could hardly have chosen clearer or more forceful language to express its intention to preclude *any* judicial review of a "determination respecting an application" for SAW status, other than in the specified review proceedings applicable to individual deportation or exclusion orders.

In light of IRCA's clear directions, district courts are not free to draw on their federal question jurisdiction under 28 U.S.C. 1331, or on their jurisdiction granted under the immigration laws, 8 U.S.C. 1329,[9] to entertain

[8] 8 U.S.C. 1105a(a)(9) may provide a limited exception for review of a deportation order in habeas corpus proceedings at the behest of an alien who is "held in custody." Compare *Marcello* v. *District Director*, 634 F.2d 964, 966-972 (5th Cir.) (finding such jurisdiction to exist), cert. denied, 452 U.S. 917 (1981), with *Daneshvar* v. *Chauvin*, 644 F.2d 1248, 1251 (8th Cir. 1981) (limiting the provision to "review of the denial of discretionary relief where deportability itself is not an issue"). "The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission." *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982).

[9] 8 U.S.C. 1329 is a general provision in the immigration laws that states, in pertinent part: "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter." The provision was enacted in 1952 (Immigration and Nationality Act, ch. 477, § 279, 66 Stat. 230), based on a nearly identical predecessor dating from 1917 (Act of Feb. 5, 1917, ch. 29, 39 Stat. 893-894)—long before Congress eliminated the amount-in-controversy requirement for invoking federal question jurisdiction under 28 U.S.C. 1331. See Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721). Section 1329 was enacted in a chapter devoted to penalty provisions, and, given its context and history, could reasonably be interpreted to apply only to such matters. See H.R. Rep. No. 1354, 82d Cong., 2d Sess. 222-223 (1952). Although courts have not so confined Section 1329, its general grant of jurisdiction uses similar language to 28 U.S.C. 1331, and therefore has been accorded a similar reach—limited, of course, to immigration matters. See *Acosta* v. *Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1977) ("[I]n view of the similarity of the language used in the two sections we think that section [1329] should be given an interpretation, similar to that which is accorded section 1331 * * *.").

collateral attacks on procedures used to adjudicate SAW applications. The exercise of either source of general power is barred by the precise and specific language of IRCA. It is well settled that when Congress has established a particular review mechanism, courts are not free to fashion alternatives to the specified scheme. See *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 419-422 (1965); *Yakus* v. *United States*, 321 U.S. 414, 429-431 (1944).[10]

[10] The Administrative Procedure Act (APA) reflects a similar principle. See 5 U.S.C. 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action * * * in a court of competent jurisdiction."). Additionally, when Congress specifies that judicial review of agency action shall be had in the courts of appeals—as Congress has required for at least the vast majority of deportation orders—district courts cannot assert general jurisdiction to review the same actions. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Litigants may not evade these provisions [requiring review of FCC orders in the courts of appeals] by requesting the District Court to enjoin action

In this case, permitting review of an alleged pattern and practice of INS conduct in district court would lead to a "rather peculiar" division of jurisdiction, because the courts of appeals, in reviewing deportation orders, would hear "only the application of the statute in presumably less important individual cases," while district courts would review "the much more important cases involving broad questions * * * that would apply to a whole class of aliens." *Ayuda, Inc.* v. *Thornburgh*, 880 F.3d 1325, 1331-1332 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018. The structure of the statute refutes the view that Congress intended such an anomaly. The statute contemplates administrative review of objections to a denial of SAW status (8 U.S.C. 1160(e)(2)), and, by incorporating 8 U.S.C. 1105a, requires that such administrative remedies be exhausted. Carving out a particular class of claims for immediate district court review frustrates that objective.

Moreover, permitting such actions breeds confusion about the appropriate record and standard of review. IRCA specifically designates the record for judicial review, and formulates a highly restrictive standard for reversal. 8 U.S.C. 1160(e)(3)(B). There is no ready way for district courts to apply those standards in broad class actions addressing generalized issues divorced from the circumstances of a particular case. Indeed, the structure of the Act—focusing as it does on judicial review of individual determinations—reveals Congress's intention to insist that courts review agency action under IRCA not at the "program" level, but as applied in each particular case. The facial challenges to agency policy mounted in this case and in *Ayuda* cannot be squared with that objective.

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that is the outcome of the agency's order."); *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744-745 (1985). See generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3943, at 322-323 (1977); *id.* at 326-329 (Supp. 1990).

2. The legislative history and background against which IRCA was enacted are fully consistent with the import of Section 1160(e)'s language. The Senate precursors to IRCA would have gone farther than the statute later enacted by precluding all judicial review of decisions or determinations involving the legalization program.[11] In explaining the rationale underlying such a complete prohibition of judicial review, the Senate Report on a 1985 bill noted that since the legalization program was of a "magnitude * * * unique in history," it would require a "major managerial effort * * * to review the applications and assure that applicants qualified to be legalized will actually receive this benefit and that other applicants will not." S. Rep. No. 132, *supra*, at 48. Concerned about the incentives and opportunity of ineligible applicants to delay the disposition of their cases and derail the program, the Committee stated that the purpose of precluding all judicial review was "to insure reasonably prompt final determinations" so that dilatory tactics could not inter-

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[11] A Senate bill introduced in the 98th Congress (relating to the general legalization program only) expressly prohibited all judicial review. See S. 529, 98th Cong., 1st Sess. § 301(a) (1983) ("No decision or determination made by the Attorney General under this section may be reviewed by any court of the United States or of any State."); S. Rep. No. 62, 98th Cong. 1st Sess. 53 (1983). Senator Cranston supported an amendment to this bill much like the judicial review provision later enacted in IRCA. He described it as providing a "very limited form of judicial review [that] would not expand the burden of the courts." Rather, "[i]t would be available only when an improper denial of legalization is raised as a defense in a deportation proceeding." 129 Cong. Rec. 12,810-12,811 (1983) (remarks of Sen. Cranston). That amendment was rejected. *Id.* at 12,837. Although both the Senate and the House passed immigration reform bills in the 98th Congress, their conflicting provisions were not reconciled and no final bill was enacted. The Senate bill that passed in the 99th Congress also precluded judicial review, but the House version containing the present language prevailed in conference. See note 12, *infra*.

fere with "the expeditious operation of the program for others." *Ibid.*[12]

Although the legislation ultimately enacted provided for limited judicial review, Congress did not intend to open the door to the kind of action brought here. As the House Committee Report explained, "[t]he bill provides for limited administrative and judicial review of denials of applications for legalization. * * * [T]he applicant can appeal a negative decision within the context of judicial review of a deportation order." The sectional analysis of the bill confirms that the provision governing review in the SAW program "[r]estricts judicial review to the context of review of an order of exclusion or deportation." H.R. Rep. No. 682, *supra*, Pt. 1, at 74, 99.

Given the size of the undertaking involved in the legalization programs, the restrictions on judicial review are "quite purposeful." *Ayuda*, 880 F.2d at 1330. According to Congressional Budget Office estimates in 1985, as many as 5.6 million undocumented aliens lived in the United States, and as many as 565,000 would apply for legalization. S. Rep. No. 132, *supra*, at 64. The legalization program was described as "a 'one-time-only' program to address a problem reulting from the large-scale illegal immigration of the past." *Id.* at 16. Although the magnitude and demands of the program were originally seen as warranting preclusion of all judicial review, the desire to insure fairness to applicants led to a compromise allowing limited review to individuals confronted with an order of deportation or exclusion. There is no

[12] The bill in question, which would have established a general legalization program, provided for "no * * * judicial review (by class action or otherwise) of a decision or determination under this section." S. 1200, 99th Cong., 1st Sess. § 202(f) (1985). Although S. 1200 passed the Senate, the House version, H.R. 3810, 99th Cong., 2d Sess. (1986), which provided for limited judicial review, was accepted in conference. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 92, 95-96 (1986) (noting the selection of the House legalization provisions without explanation and without reference to judicial review provisions).

evidence that, in effecting that compromise, Congress envisioned that district courts would have the power (and obligation) to supervise the processing of thousands of legalization applications under the aegis of reviewing a "pattern and practice" of INS conduct.[13]

B. Respondents' Complaint Challenges Determinations Respecting Applications For Adjustment Of Status, And Therefore Cannot Be Brought In This Action

The present action raises claims within the coverage of IRCA's jurisdictional provisions. Those claims can thus be advanced only in a statutory review proceeding, not in a district court class action by either the individual or the organizational respondents.

1. *The Individual Respondents.* The complaint alleged that the individual respondents (and the class they sought to represent) were denied SAW status because of alleged unlawful procedures employed by INS in adjudicating their applications. For example, the complaint asserted that INS imposed an improper burden of proof on SAW applicants; that INS denied SAW applicants the opportunity to present witnesses; that INS failed to furnish translators at government expense; and that INS provided defective notices of denial, hindering the ability of rejected SAW applicants to prosecute an administrative appeal. Compl. paras. 64, 80-82, 86; J.A. 38-39, 43-45. Each of these claims directly attacks the process used by INS to make a determination respecting entitlement to SAW status. Hence, they could all have been

[13] A bill recently introduced in the House would provide that "[n]othing in the provisions of [IRCA] * * * shall be construed—(1) as preventing judicial review" under the APA, 28 U.S.C. 1331, or 8 U.S.C. 1329 of "regulations, policies, and practices governing the adjustment of status under IRCA," or as preventing certain forms of relief from being granted. See H.R. 4300, 101st Cong., 2d Sess. § 322(a) (1990). The bill is pending before the House Committee on the Judiciary; we will, of course, inform the Court of any legislation affecting this case.

raised before INS's Administrative Appeals Unit (AAU), which provides administrative review of denials in the legalization programs. See 8 C.F.R. 103.3(a)(2), 210.2(f).[14] The same claims could then be raised on review of an exclusion or deportation order, *INS* v. *Chadha*, 462 U.S. at 938 ("the term 'final orders' in [Section 1105a]' includes all matters on which the validity of the final order is contingent'"); *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1019 & n.1 (5th Cir. 1990) (finding jurisdiction over a challenge to the denial of legalization in the context of reviewing a deportation order, and setting aside the AAU's denial); *Farrokhi* v. *INS*, 900 F.2d 697, 703-704 (4th Cir. 1990) (considering and rejecting an alien's legalization claim in the context of reviewing a deportation order).

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[14] Even if the AAU would not have had the authority to address respondents' constitutional claims, see *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); but see *Farrokhi* v. *INS*, 900 F.2d 697, 701 (4th Cir. 1990) ("Nothing appears to divest the BIA from hearing procedural due process claims that do not seek invalidation of congressional enactments."), individual aliens could, "throughout the statutory proceeding, raise and preserve any due process objection to * * * the procedure, and secure its full judicial review" as provided by IRCA. *Yakus*, 321 U.S. at 437.

Moreover, the AAU could be urged to afford commensurate relief on statutory grounds, thus eliminating the need for judicial intervention. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772-773 (1947). This consideration takes on particular force in light of respondents' contention that the procedural protections they seek are actually required by INS regulations (see Pet. App. 16a)—a contention well within the AAU's power to address. Alternatively, an alien might be found ineligible on grounds unrelated to the constitutional issue. See *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (the exhaustion requirement "assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions * * *."). But in this case, many of the individual respondents did not even pursue their claims beyond the legalization office or Regional Processing Facility levels. See Pet. App. 26a.

The individual respondents claimed to attack only "practices," "policies," and "procedures" independent of their particular cases—not any "determination[s] respecting" their applications for SAW status. Pet. App. 11a. But respondents cannot bypass IRCA through such a pleading device because the practices in question cannot be divorced from their impact on individual applications. Cf. *Heckler* v. *Ringer*, 466 U.S. 602 (1984). Indeed, if the complaint were characterized as challenging only an INS "practice," wholly apart from its concrete application in a particular case, the complaint would fail even to identify "agency action" that is amenable to judicial review under general principles of reviewability. The Court held a strikingly similar agency "program" to be unreviewable under the Administrative Procedure Act just last Term in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3172 (1990). As the Court explained in that case (slip op. 17-18):

> Respondent alleges that violation of the law is rampant within this program * * *. Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm.[15]

But respondents did not in fact limit their attack as they now contend. Rather, they specifically sought review of INS's practices as they affect individual application denials. The complaint described the "harm" suffered by the individual respondents as the denial of SAW status, Compl. para. 56; J.A. 36, and it sought (in addition to prospective changes in INS procedures) an order

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[15] See also *Perales* v. *Casillas*, 903 F.2d 1043, 1053 (5th Cir. 1990) ("The district court's fundamental error is the attempt to issue a class-wide restraint on the basis of a quintessentially individual problem.").

requiring INS "to set aside all denials of SAW applications filed by Plaintiffs and members of the class they seek to represent who are subject to the practices, policies, and procedures addressed in this complaint," and "to reconsider all [such] SAW applications." Compl., Prayer for Relief, paras. D(8)-D(9); J.A. 48. Likewise, the district court ordered INS to vacate some notices of denial, to reconsider other denials, and to afford still other applicants new opportunities to submit evidence. Pet. App. 56a.

Such individualized relief makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of INS's denials of SAW applications in particular cases, and to do so free from the constraints expressly imposed by Congress. That reading of the complaint is no less accurate simply because respondents stopped short of asking that any applicant actually be granted SAW status by the court. The complaint simply combined many individual procedural claims, none of which was cognizable individually in district court, into one composite claim. But claims that are jurisdictionally barred individually cannot be salvaged by combining them into a class action. Cf. *Snyder* v. *Harris*, 394 U.S. 332 (1969) (in a class action founded on diversity jurisdiction, aggregation of claims is not permitted for purposes of satisfying the jurisdictional-amount requirement).

In short, the specific claims raised in the complaint that have "been reduced to more manageable proportions, and [their] factual components fleshed out, by some concrete [agency] action," *Lujan*, slip op. 17, are not reviewable in this proceeding—which, in essence, seeks review of INS's initial or final denials of many individual applications. Respondents' claims attack integral parts of the process of making a "determination respecting an application"; to allow such matters to be isolated for wholesale challenge—outside the context of individual deportation or exclusion orders—runs counter to the expressed intent of Congress.

In a closely analogous context, this Court has rejected arguments that individual plaintiffs can bypass restrictions on judicial review by purporting to attack general policies rather than individual results. *Heckler* v. *Ringer*, 466 U.S. 602 (1984). The plaintiffs in *Ringer* contended that their lawsuits (challenging the refusal by Secretary of Health and Human Services to reimburse Medicare claimants for a particular form of surgery) were permissible without waiting for the Secretary's final decision on their benefits claims, because they challenged only the Secretary's " 'procedure' for reaching her decision," not the underlying decision on their particular claims. 466 U.S. at 614. This Court rejected the purported distinction, explaining that "it makes no sense to construe the claims * * * as anything more than, at bottom, a claim that they should be paid for their * * * surgery." *Ibid.* Explaining that the procedural challenges were "inextricably intertwined" with the underlying benefits claims, the Court concluded that "all aspects of respondents' claim for benefits should be channeled first into the administrative process which Congress has provided for the determination of claims for benefits." *Ibid.* The Court expressly rejected the contention —also urged by the respondents here—that "simply because a claim somehow can be construed as 'procedural,' it is cognizable in federal district court by way of federal-question jurisdiction." *Ibid.*[16]

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[16] Respondents have suggested (Br. in Opp. 13 & n.9) that *Heckler* v. *Ringer* can be distinguished because that case construed the language in the Medicare Act restricting review of "any claim arising under" that Act (42 U.S.C. 405(h)), while this case involves the language in IRCA restricting review of "a determination respecting an application" (8 U.S.C. 1160(e)(1)). But as with the "claim arising under" language considered in *Ringer*, a "determination respecting" an application cannot be confined to the final decision on the particular claim; rather, it quite naturally encompasses the myriad of subsidiary procedural "determinations" that lead up to the ultimate decision on an application. Cf. *Foti* v. *INS*, 375 U.S. at 229 (the term "final order of deportation" includes "all

Because the courts have jurisdiction to hear respondents' claims in reviewing deportation or exclusion orders, the denial of district court review does not raise "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). Indeed, no heightened showing of congressional intent is required to conclude that general district court review is unavailable for individual applicants under IRCA. Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967); *United States* v. *Fausto*, 484 U.S. at 452. Review in this case is not foreclosed; it is simply directed to another forum. Cf. *Florida Power & Light Co.* v. *Lorion*, *supra* (resolving the question whether review was available in district court or court of appeals without discussing the presumption against preclusion of review). For that reason, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is inapposite. There, the Court held that notwithstanding provisions barring all judicial review of individual Medicare Part B *claims*, a district court challenge to *regulations* under Part B was permissible. But that holding was necessary to avoid a total preclusion of judicial review of those regulations, 476 U.S. at 670-676, a conclusion that would have raised a "serious constitutional question." *Id.* at 681 n. 12. That consideration has no bearing on the proper construction of IRCA.[17]

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determinations made during and incident to the administrative proceeding").

[17] Nor is this case like *UAW* v. *Brock*, 477 U.S. 274 (1986), where the Court upheld the ability of a union (on behalf of its members) to challenge the Department of Labor's guidelines governing a special federal unemployment benefits scheme. The applicable statute, the Trade Act of 1974, 19 U.S.C. 2101 *et seq.*, provided that benefits determinations were to be made by a cooperating state agency, and that such determinations were subject to judicial review only as provided under state law. The Court held that a federal court challenge to the Department of Labor's *guidelines* was permissible because the challenge did not seek benefits for any

2. *The Organizational Respondents.* The court of appeals compounded its error by upholding the district court's jurisdiction over the claims of the organizational respondents. MRS predicated its right to sue on its status as a "qualified designated entity," which the statute charged with assisting applicants. It claimed that INS's conduct discouraged eligible applicants from filing applications and thereby prevented MRS from performing its mission under IRCA. HRC simply claimed injury to itself because of an impairment of its ability to assist its members and the diversion of its resources. Compl. paras. 17-18; J.A. 23-24; Pet. App. 41a.[18]

Organizations such as MRS and HRC, of course, cannot themselves obtain review of the operation of the SAW program by raising claims on review of an order of deportation or exclusion. But far from suggesting that these organizations are free to bring district court challenges to substantive or procedural aspects of the SAW program (unencumbered by the need to exhaust administrative remedies), the absence of a provision giving these parties judicial recourse suggests that Congress did not intend to authorize such challenges at all. As explained above,

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particular claimant. 477 U.S. at 284-285. But that holding flowed from the quite different language restricting judicial review in the Trade Act, which applied only to "determination[s] by a cooperating *State* agency"—not to determinations by the Labor Department such as its program-wide guidelines. 19 U.S.C. 2311(d) (emphasis added). No such division of responsibilities between different sovereigns, or even different agencies, exists here. Moreover, the holding in *Brock* was necessary to assure some federal forum for initial review of the Department of Labor's substantive rules. As we have pointed out, district court jurisdiction is not needed for that purpose under IRCA.

[18] HRC also claimed indirect injury because of adverse effects on its membership. Compl. para. 17; J.A. 23. But any such claim of representative standing depends on a showing that the members themselves could sue "in their own right." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Because individual SAW applicants may not circumvent IRCA's judicial review provisions by commencing an action in district court, the organizations cannot sue as their representatives.

the matters raised in the complaint that are reviewable under IRCA are matters integral to the determination of individual applications, and the Act precludes *all* judicial review with respect to such matters—not just review at the instance of an applicant—except in a challenge to an order of deportation or exclusion. Thus, review at the instance of respondent organizations is not available.

"[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Although there is ordinarily a presumption favoring judicial review, it is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351, quoting *Association of Data Processing Service Organizations, Inc.*, v. *Camp*, 397 U.S. 150, 157 (1970). See also *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). In *Block*, this Court applied those principles in rejecting a claim that consumers could challenge administrative milk-handling orders free from the exhaustion requirements applicable to milk producers and handlers, the parties subject to those orders. The absence of any express provision for consumers to mount such challenges, the detailed scheme governing challenges by other parties, and the overlap of the consumers' interest with that of other parties strongly indicated that Congress had not intended to permit judicial review at the instance of consumers. The same principles are even more clearly applicable here in light of the explicit statutory limitation of judicial review.

Although Congress provided for qualified designated entities in order to encourage aliens to come forward and apply for legalization, it did not designate those entities as "litigating ombudsmen" for aliens. *Ayuda*, 880 F.2d at 1339. Congress's careful description of the functions of a qualified designated entity—a description that does

not include authorization to sue—constitutes powerful evidence that no such role was intended. Cf. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). Nor, of course, did Congress identify any role under IRCA for a group like HRC, which simply seeks to assist Haitian refugees. Those omissions counsel against the recognition of a right for these groups to litigate claims belonging to individual applicants, for whom an opportunity for judicial review is provided.

It is not simply IRCA's omission of authorization to sue that compels the denial of the organizations' claims. Permitting such actions does appreciable damage to IRCA's express design for judicial review. Without administrative appeals by individual applicants, the agency cannot complete its formulation of policy, determine whether the alleged errors warrant reversal on statutory grounds, or assess whether any procedural errors are harmless. It clearly undermines Congress's deliberate choice of case-by-case review to accord organizational plaintiffs immediate and unrestricted access to the courts under the SAW program. Moreover, since these organizations are not the intended beneficiaries of the SAW program, it is hard to imagine that Congress meant to confer upon them such unique litigation advantages. These advantages would be especially inappropriate when, as here, their legal claims essentially duplicate the legal claims of applicants, so that "no statutory interest is left unprotected by recognizing Congress' implicit preclusion of suits" by such organizations. *Ayuda*, 880 F.2d at 1340.[19] In light of those factors, preclusion of the

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[19] Respondents have insisted (Br. in Opp. 15) that they are entitled to sue because they have experienced a distinctive injury: the impaired ability to counsel their members. The nature of the *injury*, however, is not relevant to the inquiry under *Block*; that case directs attention to the nature of the legal *issues* asserted. See *Block*, 467 U.S. at 349. Indeed, just like respondents here, the consumers in *Block* claimed a distinctive injury; the Court nevertheless rejected their claim because it would "disrupt" the statutory scheme to allow consumers to assert in court "precisely the same

organizations' claims is "fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351.

Contrary to the court of appeals' apparent view, the question is not whether HRC and MRS might have alleged injury-in-fact for standing purposes under Article III. See Pet. App. 11a n.10, citing *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 378-379 (1982) (holding that an organization's impaired ability to counsel its members satisfies the Article III requirement of injury-in-fact). IRCA's detailed provisions manifest a far more restrictive approach to judicial review than the constitutional minimum examined in *Havens Realty*. And, as "congressional preclusion of judicial review is in effect jurisdictional," *Block*, 467 U.S. at 353 n.4, the conclusion that Congress did not intend to authorize suit by the organizational plaintiffs means that the district court was without subject matter jurisdiction to hear that complaint.

C. No Jurisdictional Exception Exists Under IRCA For Actions Alleging A "Pattern And Practice" of Misconduct

In rejecting petitioners' jurisdictional arguments, the court of appeals never analyzed the structure of IRCA or the language used by Congress in limiting judicial review. Instead, the court relied on two court of appeals precedents under the general immigration laws that purportedly created a "pattern and practice" exception to 8 U.S.C. 1105a. Pet. App. 9a-11a, citing *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*. While those cases, in our view, are wrongly decided, they are in any event not controlling here. Neither case involved the distinctive statutory framework governing judicial review under IRCA. Moreover, importing the "pattern and practice"

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exceptions" that handlers must assert administratively. *Id.* at 348. Here also, it disrupts IRCA's system for review to allow the organizations to litigate the applicants' due process claims.

exception into IRCA produces consequences demonstrably at odds with Congress's intention to assign primary responsibility for implementation of IRCA to the Attorney General, not the courts.

1. a. The leading "pattern and practice" case is *HRC* v. *Smith*. There, a class action was filed on behalf of over 4,000 Haitians who claimed that INS was improperly expediting their asylum claims in violation of their statutory and constitutional rights. INS contended that Section 1105a, which governs judicial review of all final orders of deportation and determinations incident thereto (including asylum claims), precluded the assertion of the plaintiffs' claims in district court. 676 F.2d at 1032. Although finding INS's argument to have "surface appeal," the Fifth Circuit rejected it, asserting that an INS "pattern and practice" of violating the constitutional rights of aliens raised a "separate matter" from any individual case, and was "independently cognizable in the district court under its federal question jurisdiction." *Id.* at 1033.

The Eleventh Circuit extended the holding of *HRC* to statutory "pattern" claims in *Jean* v. *Nelson*. A class of Haitian refugees who were in the midst of exclusion proceedings sued in district court claiming that they had been denied notice of their right to apply for asylum. Although Section 1105a requires exhaustion of remedies and permits aliens to challenge only final orders of exclusion, the court concluded that those restrictions were not applicable. The court drew the same distinction marked out in *HRC* between "an individual challenge on a preliminary procedural matter," which was barred by Section 1105a, and "allegations of widespread abuses by immigration officials," which could be heard in district court under 28 U.S.C. 1331. 727 F.2d at 980 & n.32. In the latter instance, the court said, because the legal issues affect "an entire class of aliens," the purposes of postponing judicial review until after the entry of individual

final orders (the avoidance of delay and "procedural redundancy") would not be served. *Ibid.*[20]

In our view, both *HRC* and *Jean* go astray in announcing that the district courts have power to adjudicate class action "pattern and practice" claims that Congress has said may be heard only in individual cases, in another forum or at another time. Moreover, their departure from correct principles of reviewability is made clearer by this court's decision in *Lujan*, discussed at p. 19, *supra*.

The jurisdiction of the lower federal courts is governed by statute. *Finley* v. *United States*, 109 S. Ct. 2003, 2006 (1989); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another * * *."). District courts cannot assume the power to hear cases simply because it may seem wise, efficient, or prudent to do so. While *HRC* asserted that district courts may draw upon their "equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged," 676 F.2d at 1033, and *Jean* extended that principle to statutory claims, 727 F.2d at 980 n.32, "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *INS*

[20] This Court ultimately affirmed the judgment in *Jean* v. *Nelson*, *supra*, on other grounds, without discussing the jurisdictional issue. The question presented by the petition in *Jean* was whether unadmitted aliens could invoke the equal protection guarantee of the Fifth Amendment's Due Process Clause. This Court, in affirming, did not reach that question because it found that nonconstitutional grounds for decision should be considered further on remand. *Jean* v. *Nelson*, 472 U.S. at 853-857. Since neither the parties nor the Court addressed the jurisdictional issue, the decision cannot be understood to constitute endorsement of the theory espoused by the lower court. See *Hagans* v. *Levine*, 415 U.S. 528, 535 n.5 (1974); cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-1065 (1990).

v. *Pangilinan*, 486 U.S. 875, 883 (1988). *HRC* and *Jean* advance various policy reasons for short-circuiting the scheme for judicial review reflected in Section 1105a, but "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 311 (1989).[21]

b. Even if the *HRC-Jean* approach to Section 1105a were accepted, there would still be no warrant for extending that approach to IRCA. In IRCA, Congress not only incorporated the provisions of Section 1105a, but also expressly limited judicial review of a "determination respecting an application" under the SAW program to a petition for review of an order of deportation or exclusion. As the D.C. Circuit has recognized, "whatever the proper interpretation of [Section 1105a] as it relates to 'final orders of deportation,' IRCA's judicial review provisions, although employing the [Section 1105a] machinery, have a broader preclusive effect." *Ayuda*, 880 F.2d at 1337. Consequently, if there had been any doubt about the result under Section 1105a standing by itself, Congress removed it. The sole source of judicial power to review determinations respecting SAW applications is found in 8 U.S.C. 1160(e). If that section does not afford a basis for review—and it clearly does not authorize

[21] The "pattern and practice" exception is particularly unmanageable because it contains no clearly delineated boundaries. The common theme of the cases applying it seems to be only a feeling that the judiciary must "get involved" to rectify some perceived immigration problem. This, to say the least, is not a workable limiting principle. Thus, "[a]lthough the Fifth Circuit emphasized the narrowness of its holding and promised not to condone any 'end-run around the administrative process,' the application of *HRC* v. *Smith* has proliferated to the point where it now more nearly resembles a gaping hole in the middle of the INS's defensive line." *Ayuda*, 880 F.2d at 1336 (citation omitted).

sweeping district court actions not involving a challenge to a deportation or exclusion order—a district court case must be dismissed for want of judicial power.

2. The conclusion that Congress did not intend to sanction a "pattern and practice" exception under IRCA is further supported by experience. The propensity of a pattern and practice exception is not only to encourage wholesale challenges to agency programs but also to draw courts into day-to-day supervision of the activities of agency officials. Litigation under IRCA has repeatedly demonstrated that detailed judicial oversight is a nearly inevitable consequence of district court jurisdiction. Given the generally narrow scope of judicial review applied to immigration matters, that phenomenon is, beyond question, not what Congress had in mind.

This case—where the district court commanded the reopening of more than 20,000 SAW applications, ordered the hiring of translators in various languages, and dictated the fashion in which INS interviewers had to make a record of proceedings—illustrates the way in which the jurisdictional exception for "pattern" cases tends to mushroom into full-scale management of INS's functions. And this case does not stand alone. The *Ayuda* litigation in the D.C. Circuit,[22] in which the plaintiffs relied on the same jurisdictional theory as that advanced here, began as a challenge to a particular INS regulation under IRCA, but quickly metamorphosed into series of supplemental orders interpreting, applying, and expanding the original ruling "as if [the district court] were the administrator of the program." *Ayuda*, 880 F.2d at 1342. Ultimately, the government successfully appealed from one of the court's orders, but even while the appeal was pending, litigation proceeded apace in the district court,

[22] See *Ayuda, Inc.* v. *Meese*, 687 F. Supp. 650 and 700 F. Supp. 49 (D.D.C. 1988), rev'd in part, 880 F.2d 1325 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018. The facts are more fully set forth in the government's brief in response to the petition for certiorari (a copy of which has been provided to respondents here).

generating a half-dozen new orders directed at INS.[23] Other district courts have wielded their "pattern and practice" jurisdiction to extend the deadline for aliens to apply for legalization, despite Congress's express provision for a one-year application window.[24] The district courts' actions in these cases cannot be fairly described as judicial "review." Rather, by restructing major aspects of the legalization programs, these actions have shifted to the judiciary a variety of policy and administrative decisions that Congress entrusted to the Attorney General.

This result is particularly inappropriate in light of the paramount role of the political branches in immigration matters. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972). This Court has long held that the essentially political nature of immigration matters requires a correspondingly lim-

[23] Among these was an order appointing a Special Master to find facts and recommend what relief, if any, would be appropriate for aliens who failed to file a timely application for legalization because of the regulation invalidated by the district court. Because of the potential burden of such proceedings, the government challenged the appointment of a Special Master by petitioning for mandamus, but the D.C. Circuit denied the petition. *In re Thornburgh*, 869 F.2d 1503 (1989).

[24] See *Catholic Social Services, Inc.* v. *Thornburgh*, No. S-86-1343-LKK (E.D. Cal. June 10, 1988), appeals pending, Nos. 88-15046, 88-15127 and 88-15128 (9th Cir. argued Nov. 18, 1988); *LULAC* v. *INS*, No. 87-4757-WDK (C.D. Cal. 1988), appeal pending, No. 88-15046 (9th Cir.). Although the Ninth Circuit expedited briefing and argument in these cases, no decisions have issued, and, on June 28, 1990, the panel issued an order, sua sponte, that withdrew and deferred submission of these cases pending this Court's decision in the instant case. In the meantime, under the terms of stays entered in these cases, INS has been compelled to accept legalization applications, grant work authorization, and withhold deportation to class members for nearly two years—despite Congress's intention to create a one-year program. 8 U.S.C. 1255a(a)(1)(A), 1255a(f)(2). Over 70,000 aliens have filed applications under the terms of the stays. Compliance with these stays has proved to be a major logistical and financial strain for INS.

ited role for the courts. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); *The Japanese Immigrant Case*, 189 U.S. 86, 97 (1903). As the Court explained in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Id.* at 81-82 (footnote omitted); *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). The courts, of course, have the ultimate responsibility to declare the due process rights of aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982).[25] But nothing in this Court's jurisprudence indicates that judicial intervention to adjudicate those rights should preempt the mechanisms Congress established for that purpose. In an area as sensitive as the administration of a massive legalization program involving millions of aliens, courts should be particularly hesitant to depart from the case-by-case method of review that Congress provided. In this case, a correct reading of IRCA compels the conclusion that the exercise of judicial power sanctioned by the court of appeals was unwarranted.

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[25] Even in discharging that task, the Court has emphasized that "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature. * * * The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon* v. *Plasencia*, 459 U.S. at 34-35.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DAVID V. BERNAL
Attorney

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APPENDIX

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1105a provides in pertinent part:

Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 1252(b) of this title or comparable provisions of any prior Act, except that—

* * * * *

(9) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made * * * under the provision of section 1226 of this title * * * may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the

administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

8 U.S.C. 1160 provides in pertinent part:

Special agricultural workers

(a) Lawful residence

(1) In general

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets the following requirements:

(A) Application period

The alien must apply for such adjustment during the 18-month period beginning on the first day of the seventh month that begins after November 6, 1986.

(B) Performance of seasonal agricultural services and residence in the United States

The alien must establish that he has—

(i) resided in the United States, and

(ii) performed seasonal agricultural services in the United States for at least 90 man-days,

during the 12-month period ending on May 1, 1986. For purposes of the previous sentence, performance of seasonal agricultural services in the United States for more than one employer on any one day shall be counted as performance of services for only 1 man-day.

(C) Admissible as immigrant

The alien must establish that he is admissible to the United States as an immigrant, except as otherwise provided under subsection (c)(2) of this section.

* * * * *

(e) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide a single level of administrative appellate review of such a determination.

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(3) Judicial review

(A) Limitation to review of exclusion or deportation

There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under Section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 U.S.C. 1329 provides:

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under Section 1325 or 1326 of this title may be apprehended. No suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinue without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.

28 U.S.C. 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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